

1
2
3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 KIMBERLY E. BROWN,

7 Plaintiff,

8 v.

9 CAROLYN W. COLVIN, Acting
10 Commissioner of Social Security,

11 Defendant.

Case No. 2:15-cv-01256-RJB-KLS

REPORT AND RECOMMENDATION

Noted for June 10, 2016

15 Plaintiff has brought this matter for judicial review of defendant's denial of her
16 application for disability insurance benefits. This matter has been referred to the undersigned
17 Magistrate Judge.¹ The undersigned recommends the Court reverse defendant's decision to deny
18 benefits and remand this matter for further administrative proceedings.

20 FACTUAL AND PROCEDURAL HISTORY

21 On February 16, 1999, plaintiff applied for disability insurance benefits, alleging she
22 became disabled beginning February 13, 1996.² Her application was denied on initial
23 administrative review and on reconsideration.³ A hearing was held before an administrative law
24

25

¹ *Mathews, Sec'y of H.E.W. v. Weber*, 423 U.S. 261 (1976); 28 U.S.C. § 636(b)(1)(B); Local Rule MJR 4(a)(4).

26 ² Dkt. 17, Administrative Record (AR), 706.

³ *Id.*

1 judge (ALJ), and in a written decision dated May 24, 2002, that ALJ determined that plaintiff
 2 could perform other jobs existing in significant numbers in the national economy, and therefore
 3 that she was not disabled.⁴ Plaintiff appealed the ALJ's decision, and based on the stipulation of
 4 the parties, this Court reversed that decision and remanded this matter for further administrative
 5 proceedings.⁵

6 A new hearing was held on remand before the same ALJ on January 7, 2005, at which
 7 plaintiff appeared and testified.⁶ In a written decision dated April 27, 2005, the ALJ again
 8 determined that plaintiff could perform other jobs existing in significant numbers in the national
 9 economy, and therefore that she was not disabled.⁷ Although shortly thereafter plaintiff requested
 10 a copy of the record and filed written exceptions to the ALJ's decision, no action occurred in the
 11 case until August 2, 2013, when the Appeals Council assumed jurisdiction and remanded this
 12 matter for additional administrative proceedings.⁸

13 A third hearing was held before a different ALJ on remand, at which plaintiff appeared
 14 and testified.⁹ In a written decision dated June 17, 2014, the ALJ determined that plaintiff was
 15 disabled from February 13, 1996, through January 25, 2004, but that as of January 26, 2004, she
 16 was no longer disabled due to medical improvement.¹⁰ It does not appear that the Appeals
 17 Council assumed jurisdiction of this case, thus making the ALJ's decision the final decision of
 18

21
 22 ⁴ AR 50-69, 74-116.

23 ⁵ AR 731-32.

24 ⁶ AR 940-73.

25 ⁷ AR 911-31.

26 ⁸ AR 706, 937-39.

⁹ AR 1382-1418.

¹⁰ AR 706-23.

1 the Commissioner.¹¹ Plaintiff then appealed that decision to this Court.¹²

2 As the parties have completed their briefing, this matter is ripe for the Court's review.
 3 Plaintiff argues the ALJ's decision should be reversed and remanded for further administrative
 4 proceedings because the ALJ erred in failing to: (1) offer valid reasons for discounting plaintiff's
 5 credibility; and (2) make specific findings regarding the length of time plaintiff could sit and
 6 stand at one time in assessing her residual functional capacity (RFC). The undersigned agrees the
 7 ALJ erred in as alleged, and therefore recommends that the decision to deny benefits be reversed
 8 and that this matter be remanded for further administrative proceedings.

10 DISCUSSION

11 The Commissioner's determination that a claimant is not disabled must be upheld if the
 12 "proper legal standards" have been applied, and the "substantial evidence in the record as a
 13 whole supports" that determination.¹³ "A decision supported by substantial evidence nevertheless
 14 will be set aside if the proper legal standards were not applied in weighing the evidence and
 15 making the decision."¹⁴ Substantial evidence is "such relevant evidence as a reasonable mind
 16 might accept as adequate to support a conclusion."¹⁵ The Commissioner's findings will be
 17 upheld "if supported by inferences reasonably drawn from the record."¹⁶

19 Substantial evidence requires the Court to determine whether the Commissioner's
 20 determination is "supported by more than a scintilla of evidence, although less than a
 21

22
 23¹¹ 20 C.F.R. § 404.984.

24¹² Dkt. 3.

25¹³ *Hoffman v. Heckler*, 785 F.2d 1423, 1425 (9th Cir. 1986); *see also Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004); *Carr v. Sullivan*, 772 F.Supp. 522, 525 (E.D. Wash. 1991).

26¹⁴ *Carr*, 772 F.Supp. at 525 (citing *Brawner v. Sec'y of Health and Human Sers.*, 839 F.2d 432, 433 (9th Cir. 1987)).

¹⁵ *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citation omitted); *see also Batson*, 359 F.3d at 1193.

¹⁶ *Batson*, 359 F.3d at 1193.

1 preponderance of the evidence is required.”¹⁷ “If the evidence admits of more than one rational
 2 interpretation,” that decision must be upheld.¹⁸ “Where there is conflicting evidence sufficient to
 3 support either outcome,” the Court “must affirm the decision actually made.”¹⁹

4 I. The ALJ’s Credibility Determination

5 Questions of credibility are solely within the control of the ALJ.²⁰ The Court should not
 6 “second-guess” this credibility determination.²¹ In addition, the Court may not reverse a
 7 credibility determination where that determination is based on contradictory or ambiguous
 8 evidence.²² That some of the reasons for discrediting a claimant’s testimony should properly be
 9 discounted does not render the ALJ’s determination invalid, as long as that determination is
 10 supported by substantial evidence.²³ To reject a claimant’s subjective complaints, the ALJ must
 11 provide “specific, cogent reasons for the disbelief.”²⁴

12 The ALJ “must identify what testimony is not credible and what evidence undermines the
 13 claimant’s complaints.”²⁵ Unless affirmative evidence shows the claimant is malingering, the
 14 ALJ’s reasons for rejecting the claimant’s testimony must be “clear and convincing.”²⁶ In
 15 determining a claimant’s credibility, the ALJ may consider “ordinary techniques of credibility
 16 evaluation,” such as reputation for lying, prior inconsistent statements concerning symptoms, and
 17

20 ¹⁷ *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975).

21 ¹⁸ *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).

22 ¹⁹ *Allen*, 749 F.2d at 579 (quoting *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971)).

23 ²⁰ *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982).

24 ²¹ *Allen*, 749 F.2d at 580.

25 ²² *Id.* at 579.

26 ²³ *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001).

25 ²⁴ *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996) (citation omitted).

26 ²⁵ *Id.*; see also *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

²⁶ *Lester*, 81 F.2d at 834.

1 other testimony that “appears less than candid.”²⁷

2 The ALJ found the record did not support plaintiff’s allegations of debilitating symptoms
 3 or limitations for three reasons: lack of treatment; improvement in her medical condition; and the
 4 nature and extent of her daily activities.²⁸ Plaintiff argues, and the undersigned agrees, that these
 5 reasons are not supported by the substantial evidence. First, while failure to receive the level of
 6 treatment one would expect for an individual claiming disability can be a valid reason for finding
 7 a claimant to be not fully credible,²⁹ an ALJ may not reject a claimant’s testimony on that basis
 8 without considering possible legitimate explanations for that failure,³⁰ such as lack of insurance
 9 or inability to afford it.³¹

10 The ALJ pointed to the fact that plaintiff stopped actively seeking treatment in November
 11 2003, and did not return for treatment until May 2005.³² However, the ALJ fails to acknowledge
 12 plaintiff’s testimony at the January 2005 hearing that she had difficulty with her insurance, that
 13 while her mother helped pay for her medical visits she too could no longer afford to do that, and
 14 that her doctor stopped seeing her due to lack of payment.³³ Plaintiff testified that the same thing
 15 happened with a subsequent treatment provider.³⁴ She also testified that she was “dropped” by
 16 her insurance, and did not go to appointments due to out-of-pocket costs.³⁵ Further, there is no
 17
 18

20 ²⁷ *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996).

21 ²⁸ AR 720-21.

22 ²⁹ *Carmickle v. Comm’r, Social Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008); *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005) *Meanal v. Apfel*, 172 F.3d 1111, 1114 (9th Cir. 1999); *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).

23 ³⁰ *Carmickle*, 533 F.3d at 1162; Social Security Ruling (SSR) 96-7p, 1996 WL 374186, at *7.

24 ³¹ *Carmickle*, 533 F.3d at 1162; *Gamble*, 68 F.3d at 321.

25 ³² AR 720.

26 ³³ AR 945, 947.

³⁴ AR 947.

³⁵ AR 949-50; *see also* AR 953.

1 indication in the record that plaintiff was able to afford greater levels of treatment for the period
 2 prior to May 2005. Reports of financial difficulties can be found in medical records from 2011 to
 3 2013 as well.³⁶ The ALJ erred in failing to consider this evidence.

4 Second, it is true that medical improvement also can be a proper basis for discounting a
 5 claimant's credibility – and that the record indicates periods of improvement from mid-2006
 6 through 2008, and again from mid-2010 and extending into 2011 – although even during those
 7 periods plaintiff continued to report symptomatology.³⁷ But both during and after those periods,
 8 plaintiff reported ongoing, significant symptoms, many of which are not linked to bereavement
 9 as the ALJ indicated.³⁸ Once more, the ALJ fails to adequately discuss that evidence, and thus
 10 here too that failure constitutes error.

12 Third, it is also true that a claimant can be found less than entirely credible if he or she
 13 can spend a substantial part of the day performing household chores or other activities that are
 14 transferable to work setting, or if those activities otherwise contradict the claimant's testimony.³⁹
 15 The ALJ found plaintiff's daily activities and social functioning were not limited to the extent
 16 one would expect given her complaints of disabling symptoms and limitations.⁴⁰ But although
 17 the record does indicate plaintiff engaged in increased activity at times, especially during those
 18 periods during which she showed improvement, it also reveals she often experienced symptom
 19

21
 22
 23³⁶ AR 1033, 1057, 1063, 1085, 1087, 1089.

24³⁷ AR 1076, 1078, 1090, 1092, 1098, 1103-04, 1106, 1108, 1139-43, 1145, 1151-52, 1155-57, 1286, 1292, 1294-95,
 1302, 1307, 1314, 1320, 1323-25, 1328-29.

25³⁸ AR 810, 1035, 1045-47, 1057-59, 1063-65, 1085, 1087, 1089-90, 1093-94, 1099, 1102, 1106, 1110, 1124, 1128-
 29, 1132-34, 1136-38, 1329-33, 1335-37, 1339, 1344.

26³⁹ *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007); *Smolen*, 80 F.3d at 1284.

⁴⁰ AR 720-21.

1 exacerbation because of such increased activity.⁴¹ Again, however, the ALJ did not adequately
 2 consider the impact of that increased activity on her ability to function, and therefore this reason
 3 is unsupported by substantial evidence as well.

4 II. The ALJ's Assessment of Plaintiff's RFC

5 Defendant employs a five-step “sequential evaluation process” to determine whether a
 6 claimant is disabled.⁴² If the claimant is found disabled or not disabled at any step thereof, the
 7 disability determination is made at that step, and the sequential evaluation process ends.⁴³ If a
 8 disability determination “cannot be made on the basis of medical factors alone at step three of the
 9 evaluation process,” the ALJ must identify the claimant’s “functional limitations and
 10 restrictions” and assess his or her “remaining capacities for work-related activities.”⁴⁴ A
 11 claimant’s RFC is used at step four of the sequential disability evaluation process to determine
 12 whether he or she can do his or her past relevant work, and at step five to determine whether he
 13 or she can do other work.⁴⁵ It is what the claimant “can still do despite his or her limitations.”⁴⁶

14 A claimant’s RFC is the maximum amount of work the claimant can perform based on all
 15 of the relevant evidence in the record.⁴⁷ However, an inability to work must result from the
 16 claimant’s “physical or mental impairment(s).”⁴⁸ The ALJ must consider only those limitations
 17

21 ⁴¹ AR 805, 810, 1041, 1048, 1057, 1106, 1110, 1122, 1124, 1128-29, 1140-42, 1145, 1151-52, 1155, 1292, 1294,
 22 1325, 1329-32, 1335-36.

23 ⁴² 20 C.F.R. § 416.920.

24 ⁴³ *Id.*

25 ⁴⁴ Social Security Ruling (SSR) 96-8p, 1996 WL 374184 *2.

26 ⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

1 and restrictions “attributable to medically determinable impairments.”⁴⁹ The ALJ also must
 2 discuss why the claimant’s “symptom-related functional limitations and restrictions can or
 3 cannot reasonably be accepted as consistent with the medical or other evidence.”⁵⁰

4 The ALJ found that beginning January 26, 2004, plaintiff had the RFC:

5 **to perform light work. . . Specifically, she can occasionally lift and carry
 6 20 pounds, frequently lift and carry 10 pounds, stand and walk 6 hours in
 7 an 8-hour workday, and sit 6 hours in an 8-hour workday (standing up
 8 and sitting down in place without leaving the workstation). She is limited
 9 to occasional balancing, stooping, kneeling, crouching, crawling with no
 10 climbing ladders, ropes, and scaffolds. She needs to avoid exposure to
 11 hazards such as working around machinery or heights. She is able to
 12 perform simple repetitive tasks with no public contacts.^[51]**

13 But because as discussed above the ALJ erred in discounting plaintiff’s credibility, it is far from
 14 clear that the ALJ’s RFC assessment accurately describes all of plaintiff’s limitations. Thus, that
 15 assessment cannot be said to be supported by substantial evidence or free of error.

16 Plaintiff argues the ALJ’s RFC assessment is further deficient because the ALJ failed to
 17 make specific findings as to the amount of time she can sit or stand at one time. The undersigned
 18 again agrees. As plaintiff points out, the Commissioner herself has recognized the impact that the
 19 need to alternate sitting and standing has on the ability to perform light work:

20 In some disability claims, the medical facts lead to an assessment of RFC
 21 which is compatible with the performance of either sedentary or light work
 22 except that the person must alternate periods of sitting and standing. The
 23 individual may be able to sit for a time, but must then get up and stand or walk
 24 for awhile before returning to sitting. Such an individual is not functionally
 25 capable of doing either the prolonged sitting contemplated in the definition of
 26 sedentary work (and for the relatively few light jobs which are performed
 primarily in a seated position) or the prolonged standing or walking
 contemplated for most light work. (Persons who can adjust to any need to vary

⁴⁹ *Id.*

⁵⁰ *Id.* at *7.

⁵¹ AR 718-19 (emphasis in original).

1 sitting and standing by doing so at breaks, lunch periods, etc., would still be
 2 able to perform a defined range of work.)
 3

4 There are some jobs in the national economy--typically professional and
 5 managerial ones--in which a person can sit or stand with a degree of choice. If
 6 an individual had such a job and is still capable of performing it, or is capable
 7 of transferring work skills to such jobs, he or she would not be found disabled.
 8 However, most jobs have ongoing work processes which demand that a
 9 worker be in a certain place or posture for at least a certain length of time to
 10 accomplish a certain task. Unskilled types of jobs are particularly structured
 11 so that a person cannot ordinarily sit or stand at will. In cases of unusual
 12 limitation of ability to sit or stand, a [vocational expert] should be consulted to
 13 clarify the implications for the occupational base.^[52]
 14

15 The Commissioner further has recognized that where the need to alternate sitting and standing
 16 "cannot be accommodated by scheduled breaks and a lunch period, the occupational base for a
 17 full range of unskilled sedentary work will be eroded."⁵³ Accordingly, because "[t]he extent of
 18 the erosion will depend on the facts in the case record, such as the frequency of the need to
 19 alternate sitting and standing and the length of time needed to stand . . . [t]he RFC assessment
 20 must be specific as to the frequency of the individual's need to alternate sitting and standing."⁵⁴

21 Defendant argues the ALJ did not place any limits on plaintiff's ability to sit or stand at
 22 any one time beyond the six-hour maximum for each activity, but instead merely found that her
 23 only limitation was that she could do neither for more than six hours, and that the standing and
 24 sitting needed to be done at her workstation. But the undersigned agrees with plaintiff that if the
 25 ALJ really did not intend for there to be a sit/stand option requirement within the amount of time
 26 she could sit and stand, there would have been no need for her to mention it. Therefore, because
 the ALJ did impose such a requirement but did not specify the frequency with which or amount
 of time she needed to perform each activity, she erred.

25 ⁵² SSR 83-12, 1983 WL 31253, at *4.

26 ⁵³ SSR 96-9p, 1996 WL 374185, at *7.

⁵⁴ *Id.*

1 III. This Matter Should be Remanded for Further Administrative Proceedings

2 The Court may remand this case “either for additional evidence and findings or to award
 3 benefits.”⁵⁵ Generally, when the Court reverses an ALJ’s decision, “the proper course, except in
 4 rare circumstances, is to remand to the agency for additional investigation or explanation.”⁵⁶ It is
 5 “the unusual case in which it is clear from the record that the claimant is unable to perform
 6 gainful employment in the national economy,” that “remand for an immediate award of benefits
 7 is appropriate.”⁵⁷

8 Benefits may be awarded where “the record has been fully developed” and “further
 9 administrative proceedings would serve no useful purpose.”⁵⁸ Specifically, benefits should be
 10 awarded where:

11 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the
 12 claimant’s] evidence, (2) there are no outstanding issues that must be resolved
 13 before a determination of disability can be made, and (3) it is clear from the
 14 record that the ALJ would be required to find the claimant disabled were such
 15 evidence credited.^[59]

16 Because given the above errors issues remain regarding plaintiff’s residual functional capacity,
 17 remand for further consideration of those issues is warranted.

18 CONCLUSION

19 Based on the foregoing discussion, the undersigned recommends that the Court find the
 20 ALJ improperly concluded plaintiff was not disabled, and that it reverse defendant’s decision to
 21 deny benefits and remand this matter for further administrative proceedings in accordance with
 22 the findings herein.

23
 24 ⁵⁵ *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996).

25 ⁵⁶ *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted).

26 ⁵⁷ *Id.*

27 ⁵⁸ *Smolen*, 80 F.3d at 1292; *Holohan v. Massanari*, 246 F.3d 1195, 1210 (9th Cir. 2001).

28 ⁵⁹ *Smolen*, 80 F.3d 1273 at 1292; *McCartey v. Massanari*, 298 F.3d 1072, 1076-77 (9th Cir. 2002).

1 The parties have **fourteen (14) days** from service of this Report and Recommendation to
2 file written objections thereto.⁶⁰ Failure to file objections will result in a waiver of those
3 objections for purposes of appeal.⁶¹ Accommodating the above time limit, the Clerk shall set this
4 matter for consideration on **June 10, 2016**, as noted in the caption.

5 DATED this 23rd day of May, 2016.
6
7
8
9
10



Karen L. Strombom
United States Magistrate Judge

26

⁶⁰ 28 U.S.C. § 636(b)(1); Federal Rule of Civil Procedure (Fed. R. Civ. P.) 72(b); *see also* Fed. R. Civ. P. 6.

⁶¹ *Thomas v. Arn*, 474 U.S. 140 (1985).